KUNSHAN YUANJIANGHONG TEXTILE CO LTD
v. CHEOW CHEE YONG & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
WAN MUHAMMAD AMIN WAN YAHYA JC
[CIVIL SUIT NO: WA-22NCC-23-01-2021]
15 JUNE 2021

CIVIL PROCEDURE: *Affidavits – Affidavit in support of application – Admissibility – Deponent did not fully understand English – Whether considered 'illiterate' within meaning of O. 41 r. 3 of Rules of Court 2012 – Whether compliance with O. 41 r. 3 mandatory or mere technicalities – Whether affidavit translated by court interpreter – Whether usage of Form 74(d) jurat correct – Whether deponent understood affidavit before signing – Whether signing on English version sufficient – Whether requirements of O. 41 r. 3 complied with – Whether certification in jurat fulfilled requirements*

The plaintiff, a company based in China and involved in the import and export business dealing with, *inter alia*, medical equipment and personal protective equipment for medical personnel, claimed that it was a victim of a glove scam perpetrated by the defendants. Immediately upon the filing of the writ and statement of claim, the plaintiff filed for interlocutory applications which were supported by an affidavit in support affirmed by Chen Yuan ('deponent') ('encl. 6'). By this application in encl. 43, the first defendant sought to expunge encl. 6 from the court's records and to set aside the court orders granted in respect of the interlocutory applications made by the plaintiff where encl. 6 was used in support of those applications. The first defendant's ground in support of the application was essentially that encl. 6, being the plaintiff's affidavit in support, was not admissible for non-compliance with or was otherwise in breach of O. 41 r. 3 of the Rules of Court 2012 ('ROC'). It was further argued that the compliance with O. 41 r. 3 of the ROC was: (i) mandatory and thus the breach was not a mere technicality; and (ii) that the breach of the provision was not curable under O. 41 r. 4 of the ROC.

Held (dismissing application with costs in cause):

(1) As the requirements of O. 41 r. 3 of the ROC are mandatory, the non-compliance must be material, *ie*, the non-compliance must have caused a substantial miscarriage of justice for it to be fatal. Whilst the deponent was not blind, he was considered to be illiterate and, while the word 'illiterate' is not defined in the ROC, it is accepted to mean a person who is not able to read or write in the language. Therefore, as the deponent did not 'fully understand' English, he could be considered illiterate within the meaning of O. 41 r. 3 of the ROC. (paras 39, 40, 45 & 46)

(2) Based on the jurat taken from encl. 6, it was clear that: (i) the deponent did not fully understand English; (ii) the affidavit was translated by a court interpreter; (iii) the translation of the affidavit was done by way of a written translation; and (iv) the affidavit was affirmed before the consular officer of the Consulate General of Malaysia in Shanghai ('consular officer'). Attached to encl. 6 was a Chinese translation of the affidavit and, at every page of the Chinese translation, the court interpreter had signed and affixed her official stamp. The consular officer would have to make sure the Chinese translation referred in the jurat was there before signing. Given that encl. 6 came with the Chinese translation and the jurat referred to it, the consular officer was satisfied that the deponent understood encl. 6. (paras 27, 28 & 65)

(3) The jurats used in affidavits are governed by O. 41 r. 1(8) which states: '(8) A jurat shall be in one of the forms in Form 74'. Form 74 ROC has four types of jurats and each has its own format, wordings and requirements. Enclosure 6 uses the Form 74(d) ROC jurat and was translated by the court interpreter and therefore, the additional part of the Form 74(d) jurat was not required. All that was required was for the court interpreter to state her name which was done in encl. 6. Therefore, the plaintiff was correct in using Form 74(d) jurat for encl. 6. The fact that the affidavit in encl. 6 was not read to the deponent would not tantamount to a non-compliance of O. 41 r. 3(a) of the ROC. (paras 47-50, 53 & 61)

(4) The deponent was able to understand basic English, thus, there was no merit in the first defendant's allegation that the deponent did not understand encl. 6 when he signed it. The deponent did not sign the Chinese translation because he was asked or required by the consular officer, who did not understand Chinese, to sign the English version only in her presence. This was understandable because the consular officer must complete the jurat pursuant to O. 41 r. 1(7) of the ROC and she would not be able to do so by signing the Chinese translation. The English version remained the official version that comes with a translation. Further, there was no requirement for the Chinese translation to be signed by the deponent and, in any event, the court interpreter had signed and affixed her official stamp at every page of the Chinese translation. (paras 76-78)

(5) The most important underlining requirement of O. 41 r. 3 of the ROC is that the deponent of an affidavit must perfectly understand the affidavit he signs. Order 41 r. 3 of the ROC uses the words, 'appeared' and 'seemed' which means the provision caters for some element of uncertainty and that makes sense because it is not possible to definitively know what the deponent of an affidavit truly understands. As long as the court is satisfied that it appears to the court that the deponent perfectly understands the affidavit, that would suffice. Hence, the requirements of

O. 41 r. 3 of the ROC had been met and the certification in the jurat by the consular officer fulfilled the said requirements. In any event the first defendant had not shown that the Chinese translation was not correct or inaccurate. (paras 79 & 82-85)

Case(s) referred to:
Chan Kiew v. Lai Sang & Anor [2002] 5 CLJ 69 HC ***(dist)***
Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***
Gan Thing Phing v. Ong Gek Kim (No 2) [1999] 7 CLJ 146 HC ***(dist)***
Gani Meyang v. Superintendent Land & Survey Department & Ors [2016] 1 LNS 1253 HC ***(dist)***
Kang Hock Him v. Ikhlas Abadi Sdn Bhd [2011] 1 LNS 1008 HC ***(refd)***
Kordial Kor Kundang Singh v. EC Controlled Demolition Sdn Bhd & Ors [2002] 6 CLJ 295 HC ***(dist)***
Maria Yusof v. Abdullah Gendak [2015] 9 CLJ 243 HC ***(refd)***
Metro Kajang Construction Sdn Bhd v. Eka Bahtera Sdn Bhd [2001] 3 CLJ 951 HC ***(dist)***
Prop Park Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor [2018] 1 LNS 852 HC ***(refd)***
S Ravi G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1995] 2 CLJ 152 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 1A, O. 29 r. 1(2B), O. 32 r. 6, O. 41 rr. 1(7), (8), 3(a), 4, 6, 13, O. 92 r. 4

Other source(s) referred to:
Malaysian Civil Procedure 2018, Vol 1, Sweet & Maxwell 41/4/40

For the plaintiff - Yeoh Tung Seng & Lee Su Ting; M/s Yeoh & Joanne
For the 1st & 2nd defendants - Rajesh Kumar Gejinder Nath & Raveena Kaur Vessy Inderjit Singh; M/s Vicknaraj, RD Ratnam Rajesh Kumar & Assocs

Reported by S Barathi

JUDGMENT

Wan Muhammad Amin Wan Yahya JC:

[1] This was an application by the first defendant in encl. 43 ("this application") to essentially expunge from the court's records the plaintiff's affidavit in support affirmed by Chen Yuan ("deponent") on 14 January 2021 ("encl. 6") and to set aside the court orders granted in respect of the interlocutory applications made by the plaintiff where encl. 6 was used in support of those applications.

[2] This application was made pursuant to O. 29 r. 1(2B) and/or O. 32 r. 6 and/or O. 41 r. 6 and/or O. 92 r. 4 of the Rules of Court 2012 ("ROC") and the main reliefs prayed for are as follows:

(a) Bahawa Afidavit Sokongan yang telah diikrarkan oieh Chen Yuan pada 14.1.2021 adalah **dibatalkan dan dikeluarkan** daripada rekod Mahkamah;

(b) **Selanjut** daripada perenggan (a) di atas, **notis-notis permohonan** yang telah difailkan oleh Plaintif seperti berikut iaitu (Lampiran 3, Lampiran 4 dan Lampiran 5) adalah **dibatalkan**:

(i) Notis Permohonan (*ex parte* Penyampaian Ganti untuk Defendan Ke-2) bertarikh 15.1.2021, Lampiran 3;

(ii) Notis Permohonan (Permohonan berkenaan CIMB Berhad) bertarikh 15.1.2021, Lampiran 4;

(iii) Notis Permohonan (*ex parte* Injunksi *Mareva* dan Proprietari) bertarikh 15.1.2021, Lampiran 5.

(c) Bahawa **apajua perintah-perintah** yang telah diberi oleh Mahkamah Yang Mulia ini di mana Plaintif telah merujuk dan menggunapakai Afidavit Sokongan yang telah diikrarkan oleh Chen Yuen adalah **diketepikan dan dibatalkan**;

(emphasis added)

[3] As can be seen from the above reliefs, the first defendant also sought to strike out the interlocutory applications filed by the plaintiff which were supported by encl. 6.

Background Facts

[4] The plaintiff is a company based in China and pleads in its amended statement of claim that it is involved in the import and export business dealing with, *inter alia*, medical equipment and personal protective equipment for medical personnel.

[5] The plaintiff claims that it is a victim of a glove scam perpetrated by the defendants.

[6] In its amended statement of claim, the plaintiff pleads, *inter alia*, that:

(i) It was desirous of purchasing powder-free nitrile gloves ("gloves") and had contacted the first defendant who claims he is the agent of the second defendant, an unknown entity.

(ii) The second defendant was introduced to the plaintiff as "Golden Ocean Enterprise".

(iii) A written agreement was subsequently prepared by the first defendant called the "purchase contract" ("agreement") for the sale and purchase of the gloves.

(iv) The agreement is between the plaintiff and the first defendant.

(v) The main terms of the agreement are as follows:

(a) the port of loading of the gloves is Port Klang;

(b) 50% of the total purchase price stated in the agreement in the amount of USD258,324 must be paid as an advance payment before the delivery of the gloves ("advance payment");

(c) the balance of 50% of total purchase price stated in the agreement in the amount of USD258,324 must be paid once the gloves are ready for delivery; and

(d) the delivery date is five days after the advance payment is paid to the first defendant.

(vi) An invoice dated 11 September 2020 was issued by the first defendant to the plaintiff ("invoice").

(vii) Based on the terms of the agreement and invoice the plaintiff was to pay the advance payment into a CIMB Bank Berhad account no. 800-8094-171 under the name Rockerfella JC Enterprise ("CIMB account").

(viii) The plaintiff paid the advance payment of USD258,324 *via* international telegraphic transfer on 16 September 2020.

(ix) Pursuant to the terms of the agreement the gloves were to be sent five days after payment is received and that is on or before 30 September 2020.

(x) The gloves were never supplied to the plaintiff by the defendants.

[7] It is pertinent to highlight at this point that Rockerfella JC Enterprise is the business registration/sole proprietorship of which the first defendant is the owner/proprietor.

Chronology Of Proceedings

[8] Immediately upon filing its writ and statement of claim, the plaintiff made the following interlocutory applications which were supported by encl. 6:

(i) enclosure 3 - the plaintiff's application for substituted service of the writ and statement of claim as well as other cause paper on the second defendant;

(ii) enclosure 4 - the plaintiff's application for discovery against a non-party to this action, CIMB Bank Berhad; and

(iii) enclosure 5 - the plaintiff's application for a *Mareva* injunction against the both defendants.

[9] An order for substituted service was granted in respect of encl. 3 ("SS order").

[10] An *ex parte* order dated 19 September 2021 ("*ex parte Mareva* injunction") was granted in respect of encl. 4 which later led to an *ad interim* order being entered by consent of parties ("*ad interim Mareva* injunction").

[11] Enclosures 4 and 5 have not been heard on the merits.

[12] On 8 February 2021, the first defendant entered appearance by filing a memorandum of appearance.

[13] The defendant has not filed his defence and had on 16 February 2021 requested for an extension of time until the disposal of this application to do so.

[14] The *ex parte Mareva* injunction lapsed on or about 2 February 2021.

[15] Therefore, there are basically only two orders which the first defendant has applied to set aside in this application which are the SS order in respect of the second defendant and the *ad interim Mareva* injunction.

This Application And The Grounds In Support

[16] The first defendant's ground in support of this application is essentially that encl. 6 being the plaintiff's affidavit in support is not admissible for non-compliance with or is otherwise in breach of O. 41 r. 3 ROC.

[17] It was further argued on behalf of the first defendant that the compliance with O. 41 r. 3 ROC is:

(i) mandatory and thus the breach thereof is not a mere technicality; and

(ii) that the breach of the said provision is not curable under O. 41 r. 4 ROC.

[18] Before I proceed to deal with both the above arguments, it is important to first highlight at this juncture that the first defendant's objection to encl. 6 was raised by way of a notice of application which then led to affidavits being filed by both parties.

[19] The plaintiff had filed an affidavit in reply (encl. 65) in response to the first defendant's affidavit in support (encl. 56).

[20] The plaintiff's affidavit in reply in encl. 65 sought to explain, *inter alia*, the background and manner in which the encl. 6 affidavit was affirmed.

[21] The first defendant, through his affidavit in reply (encl. 67) had objected to the encl. 65 for substantially the same grounds as his objection to encl. 6 and further that encl. 65 is inadmissible and cannot be used as evidence by the court.

[22] Despite his objection, the first defendant then proceeded to respond to the matters deposed in encl. 65 by the plaintiff.

[23] Further, at the hearing of this application, the court was not asked to rule on the admissibility of encl. 65.

[24] That being the case, in dealing with the merits of this application, I had done the following:

(i) I had examined encl. 6 on its own as it is; and

(ii) I had then examined encl. 6 in light of the background and explanation proffered by the plaintiff in its affidavit in encl. 65.

Whether There Was Non-Compliance With Order 41 Rule 3 ROC

[25] Order 41 r. 3 ROC provides:

> **3. Affidavit by illiterate or blind person (O. 41 r. 3)**
>
> Where it **appears** to the **person administering the oath** that the deponent is **illiterate or blind**, he shall **certify** in the **jurat** that:
>
> (a) the affidavit was **read in his presence** to the deponent;
>
> (b) the deponent **seemed perfectly to understand** it; and
>
> (c) the **deponent made his signature or mark** in his presence,
>
> and the affidavit shall **not** be used in evidence **without such a certificate unless** the **court is otherwise satisfied** that it was **read to** and **appeared** to be perfectly **understood** by the deponent
>
> (emphasis added)

[26] Before going through the above requirements of O. 41 r. 3 ROC the jurat in encl. 6 must first be examined and it has been extracted and is reproduced below:

To an affidavit by a person one deponent)
Chen Yuan)
who does not fully understand English)
affirmed on 14 JAN 2021)
at)
(translated by written translation by)
the Kuala Lumpur Magistrate Court)
Court Interpreter)
Chew Aik Leng)) 陈源
Chen Yuan
(China Resident Identity
Card No.: 350102198201304516)

Before me,

Consular Officer
NOORASHIKIN HJ MOHD BANDAK
Consular Officer

CONSULATE GENERAL OF MALAYSIA
Consular Officer
SHANGHAI

[27] From the above jurat taken from encl. 6, it can be seen, *inter alia*, that:

(i) the deponent does not fully understand English;

(ii) the affidavit was translated by a Kuala Lumpur Magistrate's Court Interpreter, Chew Aik Leng ("the court interpreter");

(iii) The translation of the affidavit was done by way of a written translation; and

(iv) the affidavit was affirmed before the consular officer of the Consulate General of Malaysia in Shanghai, Noorashikin Hj Mohd Bardam ("consular officer").

[28] Attached to encl. 6 is a Chinese translation of the affidavit ("Chinese translation") and at every page of the Chinese translation the court interpreter had signed and affixed her official stamp. An extract of the court interpreter's signature and official stamp taken from p. 35 of encl. 6 (as the signature and stamp do not overlap with other writings on of the Chinese translation) is reproduced below:

[29] The Chinese translation was not signed by the deponent.

[30] The first defendant's objection to encl. 6 is that the consular officer did not certify that:

(i) The affidavit was read to the deponent in the presence of the consular officer; and

(ii) The deponent understood the contents of the affidavit perfectly.

[31] Based on what is stated in the jurat in encl. 6, it would appear that the affidavit was not read to the deponent.

[32] However, the issue of whether the deponent understood the affidavit is a separate matter which I will deal after addressing O. 41 r. 3(a) ROC.

[33] Given that the affidavit in encl. 6 was not read to the deponent, would this then constitute non-compliance to O. 41 r. 3 ROC rendering the encl. 6 inadmissible?

The Effect Of The Failure To Read The Enclosure 6 Affidavit To The Deponent And Whether It Is Mandatory When Using The Form 7(d) Jurat

[34] Learned counsel for the first defendant, Mr Rajesh Kumar, submitted that it is a mandatory requirement under O. 41 r. 3 ROC for the encl. 6 affidavit to be read to the deponent and that it is an inflexible rule, the non-compliance of which renders encl. 6 inadmissible.

[35] Learned counsel then went to great lengths and effort to argue this point and had cited several authorities, of which the main ones I will deal with in the following paragraphs.

[36] The summary of learned counsel for the first defendant's arguments are as follows:

(i) The requirements of O. 41 r. 3 ROC are mandatory;

(ii) The failure to read encl. 6 affidavit to the deponent, being one of the requirements of O. 41 r. 3 ROC, is not a mere technicality;

(iii) It therefore cannot be said to be a technical non-compliance under O. 1A ROC (*Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329);

(iv) The affidavit also cannot be used with leave of court under O. 41 r. 4 ROC which states:

> **4. Use of defective affidavit (O. 41 r. 4)**
>
> An affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any **irregularity in the form thereof**.
>
> (emphasis added)

[37] In other words, the argument put forth on behalf of the first defendant is that the non-compliance is substantial and not just in form. In support of his arguments, learned counsel for the first defendant referred me to the following cases which essentially states that O. 41 r. 3 ROC is mandatory and is not a mere technicality:

(i) *S Ravi G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1995] 2 CLJ 152 where it was held:

> Upon a proper construction of O. 41 r. 3, 1 have no hesitation in holding that the requirements of O. 41 r. 3 are clearly and obviously **mandatory** in nature. In order to use an affidavit under O. 41 r. 3, it is absolutely essential that the conditions prescribed therein have been meticulously complied with, as the person administering the oath (in Malaysia, usually a commissioner for oaths, a Magistrate or a Sessions Court Judge) must certify that the aforesaid three conditions have been complied with, failing which the affidavit **shall not be used in evidence.**
>
> (emphasis added)

(ii) *Chan Kiew v. Lai Sang & Anor* [2002] 5 CLJ 69 where it was held:

> All the three requirements under O. 41 r. 3 are **mandatory** in nature. They are **not mere technicalities**. Those requirements go to the core of the authenticity of the contents of an affidavit which are meant to be used as evidence in court. Just like a witness giving oral testimony in open court, a deponent in an affidavit must perfectly understand the contents of the affidavit and personally make his signature or mark in the presence of the person who administers the oath. The person who administer the oath must be satisfied that the deponent knowingly, and voluntarily signed the affidavit. Failure to comply with those requirements "will lead to chaos in the conduct of litigations", (see: *Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd* (FC) [1994] 2 CLJ 729).
>
> (emphasis added)

(iii) *Kang Hock Him v. Ikhlas Abadi Sdn Bhd* [2011] 1 LNS 1008 where it was held:

> It is trite law that the requirements of this provision, as those of O. 41 r. 3 RHC 1980 are **mandatory** in nature and **not mere technicalities**. Hence, infringements would render the affidavits invalid and the contents inadmissible as evidence.
>
> (emphasis added)

[38] I have no difficulty accepting the seriousness of the issue concerning the affirmation of affidavits and that the requirements laid out in O. 41 r. 3 ROC are mandatory. In this regard, the passage referred to above from the case of *Chan Kiew* (*supra*) makes this point clear.

[39] However, the situation in this case is not as straight forwards as how learned counsel for the first defendant has made it out to be. Whilst I agree that the requirements of O. 41 r. 3 ROC are mandatory, however, the non-compliance must be material.

[40] I would go further to say that the non-compliance with O. 41 r. 3 ROC must have caused a substantial miscarriage of justice for it to be fatal. In other words, one must see the non-compliance for what it really is, meaning is it in substance or in form.

[41] I now revert to this issue of the encl. 6 affidavit not being read to the deponent by the consular officer and whether it is in breach of O. 41 r. 3(a) ROC.

[42] Without referring to encl. 65 which is the plaintiff's affidavit in reply which explains how encl. 6 was affirmed, based on encl. 6 alone, the following can be deduced from the face of the jurat in encl. 6:

(i) When the deponent went to see the consular officer with encl. 6, it must have had the Chinese translation attached to it as it is referred to in the jurat. There is no reason to doubt the consular officer on this as she is the person administering the oath.

(ii) The deponent of encl. 6 then signed encl. 6 in the presence of the consular officer. This is evident from the jurat and there is also no reason for me to suspect otherwise. In this regard to O. 41 r. 1(7) ROC provides:

> (7) Every affidavit shall be signed by the deponent and the **jurat shall be completed and signed** by the person **before whom it is sworn**.
>
> (emphasis added)

[43] Therefore, the question is whether the English translation satisfied the requirement of O. 41 r. 3(a) ROC which requires the consular officer to read the encl. 6 affidavit to the deponent.

[44] To determine this, O. 41 ROC needs to be looked at in greater detail.

[45] Firstly, it is not in dispute that whilst the deponent is not blind, he is considered to be illiterate and while the word, "illiterate" is not defined in the ROC it is accepted to mean a person who is not able to read or write in the language (*Chan Kiew* (*supra*) and *Maria Yusof v. Abdullah Gendak* [2015] 9 CLJ 243).

[46] Therefore, as the deponent does not "fully understand" English, he can be considered to be illiterate within the meaning of O. 41 r. 3 ROC. Although I would put a caveat on that since the word "fully" in the jurat can also mean that the deponent understands some English.

[47] The jurats used in affidavits are governed by O. 41 r. 1(8) which states:

> (8) A jurat shall be in one of the forms in Form 74.

[48] Form 74 ROC has four types of jurats (Forms 74(a), (b), (c) and (d)) and each has its own format, wordings and requirements.

[49] Enclosure 6 uses the Form 74(d) ROC jurat. The Form 74(d) jurat is as follows:

> (d) To an affidavit by a person who **does not understand English**. Sworn (or affirmed) on the ... day of ... , 20 ... at ... **through the interpretation** of ... (**if the interpreter is not a court Interpreter add the following**:
>
> the said ... having been first sworn that he **had truly, distinctly, and audibly translated the contents** of his affidavit to the deponent ... and that he would truly and faithfully interpret the oath (or affirmation) about to be administered unto him the said ...;).
>
> Before me
>
> ...
>
> ...
>
> Commissioner for Oaths
>
> (emphasis added)

[50] In the instant case, encl. 6 was translated by the court interpreter and therefore the additional part of the Form 74(d) jurat is not required. Therefore, all that is required is for the court interpreter to state her name which was done in encl. 6.

[51] It is of crucial importance to note that where the translation is not done by a court interpreter, the interpreter (not being a court interpreter) needs to himself take an oath. This is explained in the *Malaysian Civil Procedure 2018* (Vol. 1) by Sweet & Maxwell at 41/4/40 as follows:

> Interpretation not done by court interpreter – where the person who interprets the contents of an affidavit to the deponent is **not a court interpreter he must first take an oath to translate the contents** of the affidavit to the deponent "**truly, distinctly and audibly**". Failure to do so will render the affidavit defective (*Kordial Kor Kundang Singh v. EC Controlled Demolition Sdn Bhd & Ors* [2002] 6 CLJ 295; [2002] 2 AMR 2380). This clause in Form 74(d) should be used: "the said X [being name of interpreter] having first sworn that he had truly, distinctly, and audibly translated the contents of his affidavit to the deponent Y [being, the name of deponent] and that he would truly and faithfully interpret the oath (or affirmation) about to be administered unto him the said Y". It is thought that this requirement must be inserted in Form 74(a), (b) and (c) if the interpreter is not the court interpreter, and is not confined to 74(d) only.
>
> **However, an official interpreter of any court** or a certified interpreter in the employment of the Government of Malaysia, or of any State Government when he is engaged in the performance of his duties, after such official or certified interpreter has entered on the duties of his office, **is nor (t) required to take any oath that he will faithfully discharge those duties** (Oaths and Affirmations Act 1949 (Revised 1977) (Act 194), s. 6(2); Oaths and Affirmations Ordinance of Sarawak (Cap 55), s. 3(2); and Oaths Ordinance of Sabah (Cap 89), s 4(2).
>
> (emphasis added)

[52] A few distinctions must be made at this point on the use of the Form 74(d) jurat as opposed to the other jurats in particular Form 74(c) and they are as follows:

(i) The Form 74(d) jurat is the only jurat in the ROC which has the provision for the use of a court interpreter.

(ii) Under Form 74(d), a court interpreter is not required to take oath and is not required to translate the affidavit "truly, distinctly and audibly" to the deponent.

(iii) The requirement to "truly, distinctly and audibly" interpret the contents of the affidavit appear in Form 74(c) which applies to illiterate and blind deponents.

(iv) Form 74(d) applies specifically to deponents of affidavits who do not understand the English language. Though it was observed in *Kordial Kor Kundang Singh v. EC Controlled Demolition Sdn Bhd & Ors* [2002] 6 CLJ 295 and *Gan Thing Phing v. Ong Gek Kim (No 2)* [1999] 7 CLJ 146; [1998] 7 MLJ 351 that "English" should be replaced with "Bahasa Malaysia", however, I note that Rules Committee and the Subordinate Courts Rules Committee did not consider it necessary for the word "English" used in Form 74(d) to be changed to "Bahasa Malaysia" when the Rules of Court 2012 came into force. *Kordial* (*supra*) and *Gan Thing Phing* (*supra*) were decisions that were based on the Rules of the High Court 1980.

(v) The reason the English language was specifically used in Form 74(d) may be because an affidavit affirmed outside of Malaysia can be filed in English without a translation in the national language (O. 41 r. 13 ROC). Logically, it would be easier for a certified interpreter in a foreign country to translate English to the local language of that country rather than to translate it from Bahasa Malaysia as English is an internationally recognised language.

(vi) Therefore, the Form 74(d) jurat is the appropriate form to use when the deponent is affirming an affidavit in English but does not understand that language.

(vii) Another interesting observation is that the cases cited talked about illiteracy in terms of language (*Chan Kiew* (*supra*) and *Maria Yusof* (*supra*) but not illiteracy in generally, meaning a deponent who is not able to read or write at all regardless of the language. Form 74(d) does not use the word "illiterate" at all and only mentions of a deponent who does not understand English. It is Form 74(c) that uses the words, "illiterate" and "blind". Hence lies the difference between Form 74(c) and 74(d), the operative words being "illiterate" and "understand". A person may not understand the language but he may be able to recognise and write English alphabets.

[53] Based on the aforesaid, I am of the considered view that the plaintiff is correct in using the Form 74(d) jurat for encl. 6. This is supported by the case of *Kordial* (*supra*) which was cited and heavily relied on by learned counsel for the first defendant. In *Kordial* (*supra*) it was held:

> **The purpose of the jurat in Form (d) is crystal clear**. It is when a deponent files an affidavit **not in the language of the court** then the person who interprets it to the language of the court must first take an oath. But, in the event that the interpretation is done by the **court interpreter** then using Form (d) the court interpreter **need not take an oath**.
>
> (emphasis added)

[54] A similar position was taken in *Gani Meyang v. Superintendent Land & Survey Department & Ors* [2016] 1 LNS 1253; [2016] MLRHU 1092 which held that the correct jurat which should be used for a deponent of an affidavit who does not understand English is Form 74(d):

> [11] I wholly agree and subscribe to the 1st and 2nd defendants' submission that Gani's affidavit is defective and it cannot be used to support encl. 21. For the deponent like Gani Bin Meyang **who does not understand English** and **interpretation is required** before he could sign the affidavit, the **jurat** should be in Form 74 pursuant to O. 41 r. 1(8) of the ROC 2012 and it is as follows.
>
> (emphasis added)

[55] As the jurat in encl. 6 is based on Form 74(d) the issue now is whether the encl. 6 affidavit is still required to be read to the deponent pursuant to O. 41 r. 3(a) ROC or whether the written translations (Chinese translation) prepared and certified by the court interpreter would suffice.

[56] Putting it in another way, whether the written translation (Chinese translation) of encl. 6 can replace the need for encl. 6 to be read to the deponent.

[57] In all the cases cited by learned counsel for the first defendant, I am unable to find a single case where the affidavit in that case was interpreted by a court interpreter.

[58] Similarly learned counsel for the plaintiff, Mr Yeoh Tung Seng, was also not able to produce a single case which involved the translation of an affidavit by a court interpreter.

[59] That being the case, the only cases which may be assistance are the cases which involved the use or discuss the application of the Form 74(d) jurat. Those cases are as follows:

(i) *Kordial* (*supra*) where jurat does not state that the Commissioner for Oaths (not being a court interpreter) had taken the oath before interpreting as required under Form 74 (d). Thus, the affidavit was said to be defective due to the defective jurat.

(ii) *Chan Kiew* (*supra*) where there was no certification by the person who administered the oath, that is the Commissioner for Oaths, as to all the three requirements required under O. 41 r. 3 ROC.

(iii) *Gan Thing* (*supra*) where the jurat does not state that the plaintiff has been translated the contents of his affidavit;

(iv) *Gani Meyang* (*supra*) where the jurat was not in Form 74(d) when the deponent did not understand English; and

(v) *Metro Kajang Construction Sdn Bhd v. Eka Bahtera Sdn Bhd* [2001] 3 CLJ 951 where the name of the interpreter (not being a court interpreter) needed to be stated twice but this was not done.

[60] The facts of the above five cases are very different than the present case and most of them involved other breaches of O. 41 which is not the situation here.

[61] Having examined the principles laid down in the above-cited cases and the fact that the Form 74(d) jurat was used in encl. 6, I am of the considered view that the fact that the affidavit in encl. 6 was not read to the deponent would not tantamount to a non-compliance of O. 41 r. 3(a) ROC.

[62] I am further of the considered view that the requirement for an affidavit to be read to a deponent can be replaced with a written translation where a Form 74(d) jurat is used and the affidavit is interpreted by a court interpreter such as in the instant case.

[63] Order 41 r. 3 ROC must be read with Form 7(d).

[64] In arriving at my decision, I took into consideration the following matters:

(i) As the deponent does not (fully) understand English being the language of the encl. 6 affidavit, the jurat in Form 74(d) is the correct and proper jurat to be used.

(ii) The jurat in encl. 6 was completed and signed by the consular officer (O. 41 r. 1(7) ROC).

(iii) Enclosure 6 is interpreted by the Chinese translation annexed to the English version through the interpretation of the court interpreter. The court interpreter does not need to sign the jurat in encl. 6. In this regard, it was held in *Chan Kiew* (*supra*) as follows:

> During the course of submission, a question has also been raised whether the interpreter named in the jurat as in Form 78(d) needs to sign the said jurat. I am of the view that *there is no requirement that the interpreter needs to sign the jurat. The jurat is in fact, a certification by the person who administers the oath or affirmation ie, the commissioner for oath, not by the interpreter.* The contents of the jurat clearly show that it is the commissioner for oath who makes the certification not the interpreter. Therefore, only the commissioner for oath needs to sign the jurat. Form 78(d) (for that matter, all the other forms in Form 78), do not provide for specific column for the interpreter's signature in the jurat. If the interpreter signed the jurat, it would be awkward and out of context. It is not advisable.
>
> (emphasis added)

(iv) A court interpreter is specially recognised under the ROC and the written interpretation of encl. 6, that is the Chinese translation, which the court interpreter had signed at every page is sufficient to satisfy the requirement that encl. 6 was read to the deponent based on Form 74(d) ROC.

(v) I also noticed a slight difference in the wording of the jurat in encl. 6 and the jurat in Form 74(d) in that in encl. 6, instead of the words, "though the interpretation of" the jurat states, "translated by written translation". I do not find that there is a material departure from the Form 74(d) jurat and that the ultimate meaning is the same. In *Kordial* (*supra)* it was held that the name of the interpreter is required to be written after the words, "Melalui Penterjemahan" to show that he interpreted the affidavit. It is clear from the jurat in encl. 6 that the court interpreter interpreted the affidavit and her name clearly appears in the jurat. At the most this difference is a mere technicality (*Prop Park Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor* [2018] 1 LNS 852).

[65] Even without the aid of encl. 65, it can be reasonably concluded that the consular officer was satisfied that the deponent understood encl. 6 given that encl. 6 came with the Chinese translation and the jurat refers to it. The consular officer would have to make sure the Chinese translation referred in the jurat is there before signing.

The Plaintiff's Explanation In Enclosure 65

[66] Enclosure 6 was affirmed on 14 January 2021 and between 12 January 2021 to 14 January 2021 the plaintiff had exhibited correspondences involving the deponent, the plaintiff's solicitors and the Consulate General of Malaysia in Shanghai.

[67] In an email between the plaintiff's solicitors and the deponent on 12 February 2021, encl. 6 affidavit was sent to the deponent in both the English version and the Chinese translation.

[68] The plaintiff's solicitors also explained to the deponent as to what he needed to do to affirm encl. 6 in the presence of the consular officer.

[69] The plaintiff's solicitors attempted to have the deponent affirm encl. 6 in China using their local interpreter and had initially prepared a Form 74(c) jurat so that encl. 6 can be audibly and verbally interpreted to the deponent. However, the plaintiff was informed that the Consulate General of Malaysia in Shanghai does not provide translation services. This then necessitated the plaintiff's solicitors obtaining the translation services of the court interpreter.

[70] What is important to note from encl. 65 is that:

(i) The deponent was in communication and was involved in the preparation of encl. 6 with the plaintiff's solicitors.

(ii) The deponent had averred at para. 33 that he has "basic understanding' of English.

(iii) The deponent averred at paras. 10 and 15 that he understood the contents of the English version of encl. 6 by reading the Chinese translation.

(iv) That the Chinese translation was attached to encl. 6.

[71] The above matters are of crucial importance as they provide an explanation on how encl. 6 was prepared, translated and affirmed.

[72] At this juncture, I must highlight and emphasise that in all the cases which dealt with the issue of non-compliance of O. 41 r. 3 ROC, the objections were all raised by way of preliminary objections. This can be seen from all these cases: *Kordial* (*supra*), *Chan Kiew* (*supra*), *Gan Thing* (*supra*), *Gani Meyang* (*supra*), *Metro* (*supra*), *S Ravi* (*supra*) and *Kang Hock* (*supra*).

[73] The reason this is especially important is because when the preliminary objections were raised in those cases, the opposing party was not able to provide any explanation or proof to show that the three requirements under O. 41 r. 3 ROC were complied with.

[74] The courts in those cases could only determine whether the three requirements of O. 41 r. 3 ROC were complied with by looking only at the impugned affidavits before them.

[75] In the present case, because the first defendant raised his objection by way of this application, an interlocutory application, it gave the plaintiff the time and opportunity to explain how encl. 6 was affirmed as well as the relevant background facts.

[76] In this regard, it is also important to note that the deponent is able to understand basic English. This is also evident from the emails he had written in English. That being the case, there is no merit in the first defendant's allegation that the deponent did not understand encl. 6 when he signed it.

[77] I have also considered that the deponent did not sign the Chinese translation because he was asked or required by the consular officer, who does not understand Chinese, to sign the English version only in her presence. This is understandable because the consular officer must complete the jurat pursuant to O. 41 r. 1(7) ROC and she would not be able to do this by signing the Chinese translation. The English version remains the official version that comes with a translation.

[78] Further, there is no requirement for the Chinese translation to be signed by the deponent and in any event the court interpreter had signed and affixed her official stamp at every page of the Chinese translation.

A **"Appeared To Be Perfectly Understood"**

[79] Finally, when dealing with the issue of compliance with the requirement of O. 41 r. 3 ROC, I am of the respectful view that the most important underlining requirement of this provision is that the deponent of an affidavit must perfectly understand the affidavit he signs.

B

[80] This is highlighted in several cases cited, namely as follows:

(i) *S Ravi* (*supra*) which held:

> In order to use it as evidence, the court has to be satisfied that the affidavit was read to and explained to and appeared **to be perfectly understood by the deponent**. There is nothing in the affidavit to indicate that the affidavit appeared to be perfectly understood by the deponent.

C

(ii) *Chan Siew* (*supra*) which held:

D

> Just like a witness giving oral testimony in open court, a deponent in an affidavit **must perfectly understand** the contents of the affidavit and personally make his signature or mark in the presence of the person who administers the oath.
>
> (emphasis added)

E (iii) *Gan Thing* (*supra*) which held:

> On a perusal of the affidavits earlier filed I note that the affidavit is in Bahasa, whereas the plaintiff has signed in the Chinese language. I am not satisfied that the plaintiff **understood the contents** of his affidavit.
>
> (emphasis added)

F

[81] Whilst there are three requirements in O. 41 r. 3 ROC that needs to be complied with, the underlining requirement is contained in the last sentence of the said provisions which provides as follows:

> ... and the affidavit shall not be used in evidence without such a certificate **unless** the court is otherwise satisfied that it was read to and **appeared** to be **perfectly understood by the deponent**.
>
> (emphasis added)

G

[82] It is observed that O. 41 r. 3 ROC uses the words, "appeared" and "seemed" which means there the provision caters for some element of uncertainty and that makes sense because it is not possible to definitively know what the deponent of an affidavit truly understands.

H

[83] As long the court is satisfied that it appears to the court that the deponent perfectly understands the affidavit, that would suffice.

I

Conclusion

[84] Therefore, based on the above, I find that the requirements of O. 41 r. 3 ROC have been met and that the certification in the jurat by the consular officer fulfils the said requirements.

[85] The fact that the consular officer was involved in the discussions or queries that led to the affirmation of encl. 6 affidavit solidifies her certification in the jurat that the deponent perfectly understood what he was signing. In any event, the first defendant has not shown that the Chinese translation is not correct or inaccurate.

[86] It is for the abovesaid reasons that I dismissed this application with costs in the cause as agreed to by parties.